



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 8, 2003

Ms. Helen Valkavich
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2003-6305

Dear Ms. Valkavich:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187289.

The City of San Antonio (the "city") received two requests from the same requestor for information relating to open records requests received by the city. Specifically, the requestor asks for the following information:

- Any and all paper or electronic records relating to any and all open records requests (including cost estimates, charges, and payments) over the past 12 months.
- Any and all paper or electronic records relating to policies and procedures for handling open records requests - and related cost estimates, charges and payments - since October 1, 2001.

The requestor subsequently modified his request to exclude certain categories of information. *See Gov't Code § 552.222* (governmental body may ask requestor to clarify request if what information is requested is unclear to governmental body); *see also* Open Records Decision No. 663 at 5 (1999) (discussing requests for clarification). You state that the city will provide the majority of the requested records to the requestor. You claim, however, that some of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

As a preliminary matter, you indicate that a portion of the information you have submitted for our review is identical to information that was the subject of a previous ruling from this

office. In Open Records Letter No. 2003-4228 (2003), issued June 19, 2003, we concluded that a portion of the information at issue in the present request was excepted from public disclosure pursuant to section 552.101 of the Government Code. As you do not indicate to the contrary, we presume in this instance that the circumstances existing at the time this office issued Open Records Letter No. 2003-4882 have not changed. Accordingly, we determine that the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met for the particular information in question.¹ Thus, to the extent the information at issue in the present request is identical to the information at issue in Open Records Letter No. 2003-4882, we determine that the city must withhold such information under section 552.101 of the Government Code in accordance with our decision in Open Records Letter No. 2003-4882. *See* Open Records Decision No. 673 (2001).

Next, you have indicated that a small amount of the e-mail communications at issue represent communications that are purely personal in nature and, as such, are not "public information" within the meaning of section 552.002 of the Government Code. Chapter 552 of the Government Code is only applicable to "public information." *See* Gov't Code § 552.021. Section 552.002(a) defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Information that is collected, assembled, or maintained by a third party may be subject to disclosure under chapter 552 of the Government Code if it is maintained for a governmental body, the governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. *See* Open Records Decision No. 462 (1987).

You have marked a small portion of the submitted information that you indicate was not collected, assembled, or maintained in connection with the transaction of any official business of the city or pursuant to any law or ordinance. Upon review, we agree that this information does not relate to the transaction of official business by the city and therefore does not constitute "public information" of the city. Consequently, we have marked the information that the city is not required to disclose under chapter 552 of the Government Code. *Cf.* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of public resources).

¹The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

We next address your claim under the attorney-client privilege for the remainder of the submitted information. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Finally, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets the definition of a confidential communication depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that portions of e-mail communications at issue, together with documents attached to the e-mails, consist of confidential communications among city staff, city attorneys, and outside counsel representing the city’s legal interests. You indicate that these communications were made for the purpose of facilitating the rendition of professional legal services to the city. Furthermore, you state that the e-mails at issue were intended to be confidential, and you advise that the confidentiality of the e-mails and attached documents has been maintained. Based on your representations and our review of the submitted

information, we determine that the city has established that portions of the submitted e-mails and attached documents are protected by the attorney-client privilege. Thus, we determine that the information the city has marked as protected by the attorney-client privilege may be withheld pursuant to section 552.107 of the Government Code.

We note that the city has raised section 552.111 of the Government Code for portions of the submitted information that you have not sought to withhold pursuant to the attorney-client privilege. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6 (1993).

The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. See *Arlington Indep. Sch. Dist. v. Texas Atty. Gen.*, 37 S.W.3d 152, 160 (Tex. App.—Austin 2001, no writ); Open Records Decision No. 615 at 4-5.

You state that the information you seek to withhold under section 552.111 relates to deliberations among city staff regarding requests for public information. Upon review of the information at issue, we determine that the documents the city seeks to withhold under section 552.111 do not relate to the policymaking functions of the city. Consequently, we determine that the city may not withhold any portion of the information at issue pursuant to section 552.111 of the Government Code.

In summary, to the extent the information at issue in the present request is identical to the information at issue in Open Records Letter No. 2003-4228 (2003), we determine that the city must withhold such information pursuant to our decision in Open Records Letter No. 2003-4228. We have marked a small portion of the information at issue that is not public information under chapter 552 of the Government Code and need not be released. The portions of the submitted information that the city has marked under the attorney-client

privilege may be withheld pursuant to section 552.107 of the Government Code. The remainder of the submitted information must be released to the requestor.²

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

²Based on these findings, we do not reach your other claimed exceptions to disclosure.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'David R. Saldivar', with a long horizontal flourish extending to the right.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 187289

Enc: Submitted documents

c: Mr. Brian Collister
KMOL-TV
1031 Navarro Street
San Antonio, Texas 78205
(w/o enclosures)